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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1231

RIN 2590-AA08

Golden Parachute Payments

AGENCY: Federal Housing Finance Agency.

ACTION: Final Rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing a final regulation amending the Golden Parachute Payments regulation that was published in the Federal Register on January 29, 2009. This final rule amendment (final rule) addresses prohibited and permissible golden parachute payments to entity-affiliated parties in connection with the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks (regulated entities) as well as the Office of Finance. Additionally, this final rule responds to public comments received by FHFA on the golden parachute payment provisions.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

A. General Background

Section 1114 of the Housing and Economic Recovery Act of 2008 (HERA) amended section 1318(e) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) (12 U.S.C. 4518(e)) to provide explicit authorities to FHFA in addressing golden parachute payments and indemnification payments.¹

B. Background on Golden Parachute Payments

In the Supplementary Information to the final regulation on Golden Parachute Payments published on January 29, 2009 (the 2009 final rule), FHFA stated that in response to comments it would consider subsequent rulemaking to align provisions of the Golden Parachute Payments regulation with standards set forth in the Federal Deposit Insurance Corporation (FDIC) regulation on golden parachute payments (FDIC rule). To

¹ FHFA published an interim final regulation on Golden Parachute and Indemnification Payments in the Federal Register on September 16, 2008 (73 FR 53356). Subsequently, it published corrections rescinding that portion of the regulation that addressed indemnification payments on September 19, 2008 (73 FR 54309) and on September 23, 2008 (73 FR 54673). On November 14, 2008 (73 FR 67424), FHFA published in the Federal Register a proposed amendment to the interim final regulation that addressed indemnification payments. The public notice and comment period closed on December 29, 2008. On January 29, 2009 (74 FR 5101), FHFA published the final regulation on Golden Parachute Payments (the 2009 final rule). On June 29, 2009 (74 FR 30975), FHFA published a proposed amendment to the 2009 final rule that addressed prohibited and permissible golden parachute payments in further detail (Proposal). The Proposal noted that comments received in response to the November 14, 2008, publication on indemnification payments would be considered along with comments received in response to the Proposal. On May 14, 2013, FHFA re-issued the Proposal (78 FR 28452) (Re-proposal) and addressed only golden parachute payments, stating in the Supplementary Information that comments received on indemnification payments would be addressed in a final rule on Golden Parachute and Indemnification Payments. This final rule amends only the golden parachute payment provisions. A final rule on indemnification payment provisions remains under review.

this end, FHFA issued a proposed rule on June 29, 2009 (Proposal) to amend the 2009 final regulation and solicit comments. The Proposal included provisions that were substantially similar to those of the FDIC rule.

FHFA issued the Re-proposal on May 14, 2013, in order to narrow its approach to grandfathering, address comments regarding retirement plans, clarify its intent through both the Supplementary Information and regulatory text, and provide additional opportunity for the public to comment on any provision of the rule. The comment period for the Re-proposal closed on July 15, 2013. This final rule responds to comments and implements the Re-proposal, amending the 2009 final rule to align more closely with the FDIC rule.

FHFA recently adopted a rule setting forth definitions of terms commonly used in its regulations, and has removed a duplicative definition in this final rule.²

II. Comments on the Proposed Amendment

FHFA received comments on the golden parachute provisions of the Re-proposal from the 12 Federal Home Loan Banks (Banks), the Office of Finance (OF), and the public during the comment period for the Re-proposal, which closed on July 15, 2013. Comments received in response to the Re-proposal addressed grandfathering of plans, the double approval process, the golden parachute payment definition's exception for severance plans, mitigating factors in the FHFA Director's review, and requests for clarification, among other topics.

In response to the comments, FHFA notes generally that this final rule implements amendments to the 2009 final rule which were proposed in response to prior requests from nine of the Federal Home Loan Banks and Fannie Mae to follow the FDIC

rule's precedent. The nine Federal Home Loan Banks requested that FHFA consider changes to conform FHFA's regulation of golden parachute payments to that of the FDIC rule, as the legislative provisions on which they are based are similar to those of HERA and represent industry practice. Fannie Mae also commented that the FDIC rule implements legislation similar to HERA, so conformance with regulations would foster uniformity in regulation, public perception of fairness, and competition on a level regulatory playing field for executive talent. Fannie Mae stated that such conformance would reduce administrative burden because of existing guidance and precedent. Much of the substance of this final rule, and the comments relating to it, originate from FHFA's response to those requests to more closely align its golden parachute regulation with the FDIC rule.

A. Summary of Final Rule's Application

To provide further clarity, FHFA is addressing in this Supplementary Information the intended meaning of the regulation text. Specifically, the regulated entities and OF may find the below format useful when determining whether approval of the Director is required to enter into an agreement to make a golden parachute payment, or make a payment under such an agreement. Below is a summary of when approval of the Director is required.

A regulated entity or OF need not obtain approval of the Director to enter into a termination agreement with, or to pay under such agreement, an entity-affiliated party under the following circumstances:

² The definition of "Safety and Soundness Act" was removed. See 12 CFR 1201.1.

- A regulated entity or OF is not subject to any of the triggering events listed in paragraph 1(ii) of the definition of “golden parachute payment” (“triggering events”);
- A regulated entity or OF is no longer subject to a triggering event (e.g., it has emerged from a troubled condition); or
- An entity-affiliated party begins to receive payments under an agreement prior to the occurrence of a triggering event that continue after the triggering event, if the entity-affiliated party’s employment was not terminated in contemplation of the triggering event.

A regulated entity or OF, when subject to a triggering event, must obtain the approval of the Director if it:

- Enters into an agreement with an entity-affiliated party providing a golden parachute payment;
- Amends an employment contract containing golden parachute provisions with an entity-affiliated party;
- Renews an employment agreement (including automatic renewal) with an entity-affiliated party that contains severance provisions;
- Makes a payment related to a change in control (not resulting from conservatorship or receivership); or
- Otherwise makes a payment to an entity-affiliated party under a golden parachute agreement.

B. Grandfathering

In the Re-proposal, FHFA stated its intention to grandfather a subset of the golden parachute agreements that may currently be in place. Specifically, FHFA grandfathered all retirement plans and deferred compensation plans in place as of the Re-proposal's publication on May 14, 2013. FHFA clarified at that time that it would not grandfather severance plans, change-in-control agreements, and arrangements to make ad hoc payments, as had originally been contemplated in the Supplementary Information to the Proposal.

The Banks commented that FHFA did not provide a reason for reducing the scope of the grandfathering, and requested that all plans that could result in a golden parachute payment (including severance, change in control, and ad hoc payments) be grandfathered as of the Re-proposal, not just retirement and deferred compensation plans.

FHFA has considered the Banks' comments, but is not changing its approach to grandfathering. FHFA returns to the language of the authorizing statute, the Safety and Soundness Act as amended by HERA, which gives FHFA the authority to prohibit or limit any golden parachute payment and has no provision for grandfathering. FHFA has determined that it is appropriate to grandfather certain plans that it has reviewed, after concluding that they do not pose a risk of the kind of corporate waste and abuse that the statute was intended to prevent. These are the retirement and deferred compensation plans. FHFA has considered the remaining types of golden parachute agreements – severance agreements, change in control agreements, and arrangements to make ad hoc payments – and is unable to make the same determination with respect to them or to

satisfy itself that it is aware of all of them. Therefore, those agreements must remain subject to review by FHFA in order for FHFA to carry out its authority under HERA.

For further clarification, FHFA confirms that it has grandfathered all retirement plans and deferred compensation plans in place as of the date of the Re-proposal, with other plans subject to review by FHFA, as appropriate. The grandfathered plans include defined-contribution, defined-benefit, and deferred compensation plans in place as of the publication of the Re-proposal on May 14, 2013, without regard to whether they meet the requirements to be treated as a bona fide deferred compensation plan or arrangement under § 1231.1.

With respect to severance plans, FHFA will allow the entities three months from the effective date of the final rule within which they may submit for FHFA review and approval existing severance plans that were adopted, or modified to increase the amount or scope of severance benefits, at a time when the entity was subject to a triggering event specified in paragraph (1)(ii) of the definition of the term “golden parachute payment” but which otherwise fall under the severance exception from the definition of “golden parachute payment.” Pursuant to paragraph (2)(v)(A) of the “golden parachute payment” definition, such plans may qualify for the exception only if they receive approval from FHFA.

Below is a summary of how the definition of “golden parachute payment” applies to different plans:

Qualified pension or retirement plans and benefit plans are excepted from the requirements of the regulation and, therefore, any changes to them do not require FHFA approval.

Nonqualified retirement plans (either defined-contribution or defined-benefit plans or deferred compensation plans) established for the benefit of executives whose participation in a regulated entity's qualified plans is curtailed by the Internal Revenue Service limits are "bona fide deferred compensation plans" if they meet the requirements of that definition. Such nonqualified plans meeting those requirements are therefore excepted from the definition of "golden parachute payment."

All retirement plans established for the benefit of executives in place as of the Re-proposal's publication date of May 14, 2013, are grandfathered. From that date forward, any retirement plans that are not qualified, and that are not bona fide deferred compensation plans, and payouts on such plans, will qualify as golden parachute payments and will require FHFA review and approval, if the regulated entity is subject to a triggering event.

Severance plans are excepted if they meet the various terms of the regulation (such as those that authorize payment of not more than 12 months of compensation, as discussed further below). As stated above, FHFA will allow the entities three months from the effective date of the final rule within which they may submit for FHFA review and approval existing severance plans that were adopted, or modified to increase the amount or scope of severance benefits, at a time when the entity was subject to a triggering event specified in paragraph (1)(ii) of the definition of the term "golden parachute payment" but which otherwise fall under the severance exception from the definition of "golden parachute payment." Pursuant to paragraph (2)(v)(A) of the "golden parachute payment" definition, such plans may qualify for the exception only if they receive approval from FHFA.

Severance plans outside of the exception to the term “golden parachute payment” (such as severance plans that fail to satisfy the definition of “nondiscriminatory”) are subject to FHFA review and approval if the entity is subject to a triggering event.

Change-of-control agreements and ad hoc payments are not grandfathered or excepted and, therefore, require FHFA review and approval if the regulated entity is subject to a triggering event.

C. Double Approval

The Banks expressed concerns with the “double approval” process for golden parachute payments. According to the final rule, in any circumstance in which an agreement that provides for a golden parachute payment has been approved by the Director, an additional approval by the Director is required in order to make such a payment under the agreement if the entity is subject to a triggering event. This requirement appeared in the Proposal and in the Re-proposal, follows the structure in the statute implemented by this regulation (the Safety and Soundness Act as amended by HERA), and mirrors the practice of the FDIC for institutions subject to its golden parachute payments regulation.

The Banks state that the double approval process may create an adverse impact on a Bank’s ability to attract and retain qualified executives if an executive’s right to payment in the event of a future separation from employment is subject to the approval of the Director. The Banks expressed concern particularly in the case of change-in-control payments and when hiring new employees if an entity is currently subject to, or seeking to avoid, a triggering event.

The double approval process is supported by the following considerations: First, an agreement containing provisions that the regulator considers unreasonable for an entity subject to a triggering event should be disapproved without waiting for payments to be made under it, so that the regulated entity can develop an alternative acceptable arrangement and so that executives will not be relying on an agreement under which they will not, in the event, be able to receive payments. Further, subsequent to the approval of a golden parachute agreement, the regulated entity or OF may deteriorate further, and a golden parachute payment may negatively affect its safety and soundness, or the executive may be found to have contributed to the deterioration. To address that concern, FHFA believes that a review of both the golden parachute agreement, and the circumstances of the regulated entity or OF during the period in which the payment is actually being made, is necessary.

For these reasons, FHFA has declined to remove the double approval process, in order to uphold its responsibility to ensure the safety and soundness of the regulated entities. FHFA recognizes the challenges that may be raised by its authority to withhold golden parachute payments under certain circumstances, but believes that Congress clearly intended for golden parachute payments, in addition to agreements, to be subject to review when a regulated entity or OF is insolvent, in conservatorship or receivership, or otherwise in troubled condition, and that this is the prudentially sound result. This is the same regime that the FDIC administers under its statute and regulation.

D. Director's Review and Mitigating Factors

FHFA emphasizes that a regulated entity or OF always may apply for approval from the Director if a golden parachute payment is not otherwise permissible. The

Director's review will take into account factors set forth in § 1231.6, including the cost of the payment and the effect that the payment will have on the capital and earnings of the regulated entity. The Director may consider the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment, and other case-specific facts and circumstances surrounding the golden parachute payment as set forth in § 1231.3(b)(2)(i) through (iii). For example, the Director may consider mitigating factors such as the individual's history of beneficial contribution to the regulated entity, and cooperation with FHFA's relevant remediation efforts. The presence of any of the negative factors enumerated in proposed § 1231.3(b)(2) is not an absolute bar to the approval of a golden parachute payment. Absent mitigating factors, there would be a presumption, if any of those factors were present, that the golden parachute application should be denied. That presumption can be overcome, however, and the Director has discretion to approve payment in such circumstances.

E. Definition of Compensation

The Banks requested that FHFA provide an express definition of "compensation" in the final rule. The definition of "golden parachute payment" in § 12131.2 is "[a]ny payment (or any agreement to make any payment) in the nature of compensation by any regulated entity or the Office of Finance for the benefit of any current or former entity-affiliated party pursuant to an obligation of such regulated entity or the Office of Finance. . . ." [Emphasis added.]

The Safety and Soundness Act provision on golden parachute payments, the Federal Deposit Insurance Act provision on which it is based, and the FDIC rule on which this regulation is based all define a golden parachute payment as being "in the

nature of compensation,” but none defines the term “compensation.” The FDIC included the qualifying phrase “in the nature of compensation” in its final regulation to make clear that the FDIC did not intend to restrict institutions, even those that are troubled, from paying terminating employees accrued but unused benefits, such as vacation. The FDIC also noted that the qualifying phrase is used to show that a certain payment should be treated as a golden parachute payment because the regulators have historically treated it as compensation, e.g., payments under “split dollar” insurance agreements.

Against the statutory background, and the treatment of the concept by the FDIC in its regulation, FHFA understands “compensation” to be payment for employment or services rendered by individuals. So understood, the concept does not include the various types of payments that commenters previously expressed concern about: payments of advance proceeds, dividends, deposit account withdrawals, and AHP funds; nor does it include debt service payments from Banks to OF, or payout of accrued but unused benefits, such as vacation.

F. Inclusion of Directors

For purposes of clarity, FHFA reiterates that members of the regulated entities’ boards of directors fall within the definition of “entity-affiliated party” as stated in the statute and the rule, though directors may not have an employee relationship to the regulated entity. Directors are responsible for the governance and oversight of management of the regulated entity, and FHFA believes there is no reason to exclude them from the rule.

G. GAAP

The Banks submitted a comment on the definition of “bona fide deferred compensation plan or arrangement,” regarding GAAP accounting treatment. FHFA notes that the reference to GAAP is identical to that of the FDIC rule, and is intended to require that compensation expense is recognized and a liability accrued on a reasonable schedule and in all other ways in accordance with GAAP. No further clarification is needed to specify the timing of GAAP treatment.

H. Exception for severance

The definition of “golden parachute payment” includes an exception for payments pursuant to a nondiscriminatory severance pay plan or arrangement. The Banks requested that FHFA alter the definition of “nondiscriminatory,” and also remove the \$300,000 salary cap, which was a new addition in the Re-proposal.

The Banks requested that FHFA expressly clarify that the objective criteria that may be used in a nondiscriminatory severance pay plan can include service at other Banks. The definition of “nondiscriminatory” is modeled on the FDIC rule’s definition, and both require that under a nondiscriminatory plan, provision of different benefits can be based only on objective criteria. FHFA included the following examples of objective criteria: salary, total compensation, length of service, and job grade or classification. Other objective criteria may be used. It is not necessary for FHFA to list additional objective criteria that may be included, particularly a criterion that is specific to only some of the regulated entities.

Regarding the \$300,000 salary cap, while the Banks objected to the use of any salary cap, FHFA continues to believe that payment of a full year’s severance may be

inappropriate to certain top executives with high salaries, when their institution is in a troubled condition. However, FHFA has modified the salary cap so that it applies only to employees who are both a) executive officers, as that term is defined in FHFA's rule on executive compensation, and b) have base salaries exceeding \$300,000. This modification more narrowly tailors the regulation to allow an exception for severance, limiting its availability to certain executives for whom it may not be appropriate. As always, the Director continues to have discretion under § 1231.3(b)(1)(i) to approve golden parachute payments that are not otherwise permissible.

This \$300,000 salary cap for executive officers is now effective in this final rule. FHFA has determined that additional notice and comment is not required for this modification because its effect is to reduce the number of individuals to whom the salary cap applies to a subset of those to whom it applied under the Re-proposal. The public, the regulated entities, and OF have had an opportunity to provide comment regarding the salary cap when it applied to a larger group that included all of those to whom it currently applies.³

Regulatory Impacts

Paperwork Reduction Act

³ This is the only significant change that FHFA made from the rule as proposed.

FHFA also transferred the regulation's reference to regulated entities with low examination ratings from the list of triggering events in the definition of "golden parachute payment" to the definition of "troubled condition." Since a troubled condition is itself a triggering event to coverage under the rule, this transfer makes no difference to whether an institution is subject to the restrictions of the rule, and it is more intuitive to consider the low examination rating as part of the definition of "troubled condition" than outside of it. The resulting structure is consistent with that of the FDIC's rule, which includes a low examination rating in its definition of "troubled condition." 12 CFR 303.101(c). The transfer also makes explicit that a regulated entity must take the low examination rating into account under § 1231.3(b)(1)(iv)(B) when making its request for permission to make a golden parachute payment. The involvement of an entity-affiliated party in a regulated entity's poor condition, including as reflected in its examination rating, is a factor that the Director may in any event consider when deciding on such a request under § 1231.3(b)(2) as proposed and now final.

The Final Rule does not contain any information collection requirement that requires the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the Final Rule under the Regulatory Flexibility Act. FHFA certifies that the Final Rule is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the regulated entities which are not small entities for the purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1231

Golden parachutes, Government-sponsored enterprises, Indemnification

Authority and Issuance

Accordingly, for reasons stated in the Supplementary Information, under the authority of 12 U.S.C. 4518(e) and 4526, FHFA amends part 1231 of subchapter B of title 12 CFR Chapter XII as follows:

SUBCHAPTER B—ENTITY REGULATIONS

PART 1231—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

1. The authority citation for part 1231 is revised to read as follows:

Authority: 12 U.S.C. 4518(e), 4518a, 4526

2. The heading of part 1231 is revised to read as set forth above.

3. Section 1231.1 is revised to read as follows:

§ 1231.1 Purpose.

The purpose of this part is to implement section 1318(e) of the Safety and Soundness Act (12 U.S.C. 4518(e)) by setting forth the standards that the Director will take into consideration in determining whether to limit or prohibit golden parachute payments and by setting forth prohibited and permissible indemnification payments that regulated entities and the Office of Finance may make to entity-affiliated parties.

4. Section 1231.2 is revised to read as follows:

§ 1231.2 Definitions.

The following definitions apply to the terms used in this part:

Benefit plan means any plan, contract, agreement, or other arrangement which is an “employee welfare benefit plan” as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services, or cafeteria plans; provided however, that such term shall not include any plan intended to be subject to paragraphs (2)(iii) and (v) of the term golden parachute payment as defined in this section.

Bona fide deferred compensation plan or arrangement means any plan, contract, agreement, or other arrangement whereby:

(1) An entity-affiliated party voluntarily elects to defer all or a portion of the reasonable compensation, wages, or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the regulated entity or the Office of Finance either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits and related expenses, except that the assets of such trust may be available to satisfy claims of creditors of the regulated entities or the Office of Finance in the case of insolvency; or

(2) A regulated entity or the Office of Finance establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (1) of this definition:

(i) Primarily for the purpose of providing benefits for certain entity-affiliated parties in excess of the limitations on contributions and benefits imposed by sections 401(a)(17), 402(g), 415, or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 401(a)(17), 402(g), 415); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management, or highly compensated employees (excluding severance payments described in paragraph (2)(v) of the term golden parachute payment as defined in this section and permissible golden parachute payments described in § 1231.3(b)); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (1) and (2) of this definition, the following requirements shall apply:

(i) The plan was in effect at least one year prior to any of the events described in paragraph (1)(ii) of the term golden parachute payment as defined in this section;

(ii) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (1)(ii) of the term golden parachute payment as defined in this section and in accordance with any amendments to such plan during such one-year period that do not increase the benefits payable thereunder, provided that changes required by law should be disregarded in determining whether a plan provision has been in effect for one year;

(iii) The entity-affiliated party has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(v) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (1)(ii) of the term golden parachute payment as defined in this section;

(vi) The regulated entity or the Office of Finance has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP, or segregated or otherwise set aside assets in a trust which may only be used to

pay plan benefits and related expenses, except that the assets of such trust may be available to satisfy claims of the regulated entity's creditors or the Office of Finance's creditors in the case of insolvency; and

(vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

Entity-affiliated party means:

(1) With respect to the Office of Finance, any director, officer, or manager of the Office of Finance; and

(2) With respect to a regulated entity:

(i) Any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;

(ii) Any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Federal Home Loan Bank shall not be deemed to have participated in the affairs of that Federal Home Loan Bank solely by virtue of being a shareholder of, and obtaining advances from, that Federal Home Loan Bank;

(iii) Any independent contractor for a regulated entity (including any attorney, appraiser, or accountant) if:

(A) The independent contractor knowingly or recklessly participates in any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice; and

(B) Such violation, breach, or practice caused, or is likely to cause, more than a

minimal financial loss to, or a significant adverse effect on, the regulated entity;

(iv) Any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity.

Golden parachute payment means:

(1) Any payment (or any agreement to make any payment) in the nature of compensation by any regulated entity or the Office of Finance for the benefit of any current or former entity-affiliated party pursuant to an obligation of such regulated entity or the Office of Finance that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the regulated entity or the Office of Finance; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the regulated entity which is making the payment;

(B) The appointment of any conservator or receiver for such regulated entity; or

(C) The regulated entity is in a troubled condition.

(2) Exceptions. The term golden parachute payment shall not include:

(i) Any payment made pursuant to a pension or retirement plan that is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or pursuant to a pension or other retirement plan that is governed by the laws of any foreign country;

(ii) Any payment made pursuant to a "benefit plan" as that term is defined in this

section;

(iii) Any payment made pursuant to a “bona fide deferred compensation plan or arrangement” as that term is defined in this section;

(iv) Any payment made by reason of death or by reason of termination caused by the disability of an entity-affiliated party; or

(v) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement that provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; provided that:

(A) No employee shall receive any such payment that exceeds the base compensation paid to such employee during the 12 months (or such longer period or greater benefit as the Director shall consent to) immediately preceding termination of employment, resignation, or early retirement, and such severance pay plan or arrangement shall not have been adopted, or modified to increase the amount or scope of severance benefits, at a time when the regulated entity or the Office of Finance is in a condition specified in paragraph (1)(ii) of the term golden parachute payment as defined in this section, or in contemplation of such a condition, without the prior written consent of the Director; and

(B) If an employee is an executive officer, as “executive officer” is defined under 12 CFR 1230.2, and such employee’s base salary exceeds \$300,000, then the exception provided under this paragraph (2)(v) shall not apply to that employee; or

(vi) Any severance or similar payment that is required to be made pursuant to a state statute or foreign law that is applicable to all employers within the appropriate

jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria).

Nondiscriminatory means that the plan, contract, or arrangement in question applies to all employees of a regulated entity or the Office of Finance who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract, or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade, or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

Payment means:

- (1) Any direct or indirect transfer of any funds or any asset;
- (2) Any forgiveness of any debt or other obligation;
- (3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and
- (4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:
 - (i) The determination, after such date, of the liability for the payment of such

amount; or

- (ii) The liquidation, after such date, of the amount of such payment.

Troubled condition means a regulated entity that:

(1) Is subject to a cease-and-desist order or written agreement issued by FHFA that requires action to improve the financial condition of the regulated entity or is subject to a proceeding initiated by the Director, which contemplates the issuance of an order that requires action to improve the financial condition of the regulated entity, unless otherwise informed in writing by FHFA;

(2) Is assigned a composite rating of 4 or 5 by FHFA under its CAMELSO examination rating system as it may be revised from time to time; or

(3) Is informed in writing by the Director that it is in a troubled condition for purposes of the requirements of this part on the basis of the most recent report of examination or other information available to FHFA, on account of its financial condition, risk profile, or management deficiencies.

5. Section 1231.3 is added to read as follows:

§ 1231.3 Golden parachute payments.

(a) Prohibited golden parachute payments. No regulated entity or the Office of Finance shall make or agree to make any golden parachute payment, except as provided in this part.

(b) Permissible golden parachute payments. (1) A regulated entity or the Office of Finance may agree to make or may make a golden parachute payment if and to the extent that:

- (i) The Director determines that such a payment or agreement is permissible; or

(ii) Such an agreement is made in order to hire a person to become an entity-affiliated party either at a time when the regulated entity or the Office of Finance satisfies, or in an effort to prevent it from imminently satisfying, any of the criteria set forth in paragraph (1)(ii) of the term golden parachute payment as defined in § 1231.2, and the Director consents in writing to the amount and terms of the golden parachute payment. Such consent by the Director shall not improve the entity-affiliated party's position in the event of the insolvency of the regulated entity or the Office of Finance since such consent can neither bind a receiver nor affect the provability of receivership claims; or

(iii) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed 12 months salary, to an entity-affiliated party in the event of a change in control of the regulated entity or the Office of Finance; provided, however, that a regulated entity or the Office of Finance shall obtain the consent of the Director prior to making such a payment, and this paragraph (b)(1)(iii) shall not apply to any change in control of a regulated entity that results from the regulated entity being placed into conservatorship or receivership; and

(iv) A regulated entity or the Office of Finance making a request pursuant to paragraphs (b)(1)(i) through (iii) of this section shall demonstrate that it does not possess and is not aware of any information, evidence, documents, or other materials that would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(A) The entity-affiliated party has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the regulated entity or the

Office of Finance that is likely to have a material adverse effect on the regulated entity or the Office of Finance;

(B) The entity-affiliated party is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition of the regulated entity or the Office of Finance;

(C) The entity-affiliated party has materially violated any applicable Federal or State law or regulation that has had or is likely to have a material effect on the regulated entity or the Office of Finance; and

(D) The entity-affiliated party has violated or conspired to violate sections 215, 657, 1006, 1014, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a “financial institution” as the term is defined in title 18 of the United States Code (18 U.S.C. 20).

(2) In making a determination under paragraphs (b)(1)(i) through (iii) of this section, the Director may consider:

(i) Whether, and to what degree, the entity-affiliated party was in a position of managerial or fiduciary responsibility;

(ii) The length of time the entity-affiliated party was affiliated with the regulated entity or the Office of Finance, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(iii) Any other factor the Director determines relevant to the facts and circumstances surrounding the golden parachute payment, including any fraudulent act or omission, breach of fiduciary duty, violation of law, rule, regulation, order, or written agreement, and the level of willful misconduct, breach of fiduciary duty, and malfeasance

on the part of the entity-affiliated party.

6. Section 1231.5 is revised to read as follows:

§ 1231.5 Applicability in the event of receivership.

The provisions of this part, or any consent or approval granted under the provisions of this part by FHFA, shall not in any way bind any receiver of a regulated entity in receivership. Any consent or approval granted under the provisions of this part by FHFA shall not in any way obligate FHFA or receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification, or other agreement. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of an entity-affiliated party contrary to section 1318(e)(3) of the Safety and Soundness Act (12 U.S.C. 4518(e)(3)).

7. Section 1231.6 is added to read as follows:

§ 1231.6 Filing instructions.

(a) Scope. This section contains the procedures to apply for the consent of the Director to make golden parachute payments under § 1231.3(b) (including entering into agreements to make such payments) or to make excess nondiscriminatory severance plan payments under paragraph (2)(v) of the term golden parachute payment as defined in § 1231.2.

(b) Where to file. A regulated entity or the Office of Finance must submit a letter application to the Manager, Executive Compensation, Division of Supervision Policy and Support, or to such other person as FHFA may direct.

(c) Content of filing. The letter application must contain the following:

(1) The reasons why the regulated entity or the Office of Finance seeks to make the payment;

(2) An identification of the entity-affiliated party who will receive the payment;

(3) A copy of any contract or agreement regarding the subject matter of the filing;

(4) The cost of the proposed payment and its impact on the capital and earnings of the regulated entity;

(5) The reasons why the consent to the payment should be granted; and

(6) Certification and documentation as to each of the factors listed in

§ 1231.3(b)(1)(iv).

(d) Additional information. FHFA may request additional information at any time during the processing of the letter application.

(e) Written notice. FHFA shall provide the applicant with written notice of the decision as soon as it is rendered.

Melvin L. Watt,
Director, Federal Housing Finance Agency.

Dated: January 15, 2014.

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